

FINDINGS AND RECOMMENDATIONS ON THE ISSUANCE OF AN INCIDENTAL TAKE PERMIT FOR THE JOSHUA TREE RECREATIONAL CAMPGROUND LOW-EFFECT HCP, COMMUNITY OF JOSHUA TREE, SAN BERNARDINO COUNTY, CALIFORNIA

I. DESCRIPTION OF PROPOSED ACTION

The U.S. Fish and Wildlife Service (Service) proposes to issue an Incidental Take Permit (Permit) to JAT Associates, Inc. (JAT) under the authority of section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act) for a period of 30 years. Documents used in the preparation of this statement of findings and recommendations include the Joshua Tree Recreational Campground Low-Effect Habitat Conservation Plan (HCP) (Circle Mountain Biological Consultants June 2006), the associated Low-Effect Screening Form and Environmental Action Statement (EAS) (Service 2006a), and the Service's Biological Opinion (Service 2006b). All of these documents are incorporated by reference as described in 40 CFR §1508.13.

Based on the HCP and Permit (TE133476-0), JAT would receive take coverage for the federally threatened desert tortoise (Gopherus agassizii) on 13.8 acres of a 314.6-acre parcel for the construction and operation of a recreational campground. Proposed construction on the 13.8 acres includes 22 campsites, a fitness center, a reception/restaurant building, multiple salt water pools, massage treatment rooms, a horse stable, roads, and trails. Construction would be completed in two phases. Phase I would comprise approximately 62 percent of the total project area. The campground would be in operation for 3 to 5 years before Phase II construction begins. Construction of the two phases is expected to take 10 years. JAT plans to offset the expected impacts by implementing avoidance and minimization measures (detailed in Section 5.0 of the HCP) and by restoring and managing 13.8 acres of occupied desert tortoise habitat, which is adjacent to another 287 acres of desert tortoise habitat that will be managed and protected on the property. JAT would also receive take coverage for the management of the 300.8 acres of habitat.

Biological Goals and Objectives

JAT has identified specific biological goals and objectives for the desert tortoise in the HCP. These biological goals and objectives are meant to minimize any adverse effects of the proposed project on the desert tortoise as well as to conserve suitable habitat through the preservation and management of 13.8 acres within 314.6-acre parcel in perpetuity. The specific biological goals and objectives are found in Section 5.0 of the HCP on pages 17-20.

Monitoring and Reporting

In Section 5.0, the HCP outlines the monitoring that will be implemented. JAT will hire an authorized biologist(s) to complete preconstruction surveys and monitor fencing, grading and

other authorized construction activities that may take the desert tortoise. JAT will provide pre-construction reports 30 to 45 days prior to Phase 1 and Phase 2 construction to inform the Service that the permit is being acted upon. JAT will provide follow-up reports within 90 days after Phase 1 and Phase 2. The reports will include final determination of the acres of surface disturbance, all desert tortoise observation records, and an evaluation of the impacts to desert tortoises resulting from the construction activities. The reports will address the appropriateness of the minimization/mitigation measures, make recommendations as to how the measures may need to be changed for construction of Phases 1 and 2, and evaluate the objectives set forth in the enhancement effort of the undeveloped areas.

After construction is completed, a field contact representative (FCR) will take over the duties of the authorized biologist to monitor compliance with the HCP's avoidance and minimization measures. The FCR will also oversee the raven monitoring program that will begin after the completion of Phase 1 of construction and will continue throughout the permit term.

JAT will provide annual reports to the Service by March 31 for the preceding calendar year. JAT will document the number of desert tortoises, dates, and other pertinent information for each displaced desert tortoise during the permit term. The reports will include monitoring results, effectiveness of the monitoring program, and suggestions for improvements. The annual reports will also include information on encounters with desert tortoises on the 314.6 acres of covered lands, a cumulative total of the number of desert tortoises taken and the form of take (e.g. capture, harassment, injury, mortality, etc.), changed circumstances encountered, adaptive management implemented, and any other problems or relevant information. A more detailed description of the monitoring and reporting program is found in Section 5.0 of the HCP.

Adaptive Management

The HCP contains an adaptive management plan that will allow the conservation measures to be adjusted over time if necessary, based on the information gathered during monitoring. If, for example, the threshold of two injuries or deaths is met, or if the same desert tortoise repeats a behavior that puts it in danger, requiring multiple incidents of capture and relocation, the minimization and avoidance measures would be evaluated to determine areas of weakness and ineffectiveness. The Service-approved biologist or FCR would initiate discussions with the Service and the California Department of Fish and Game (CDFG) to develop more effective measures. The adaptive management framework is discussed in detail in Section 5.0 of the HCP and will be applied to the management of the entire 314.6-acre parcel for the benefit of the desert tortoise.

Changed and Unforeseen Circumstances

JAT provides measures to address changed and unforeseen circumstances on pages 35-37 of the HCP. JAT identifies the following situations to be considered as changed circumstances: listing of new species, disease, fire, and other natural catastrophic event. JAT also describes the

funding that will be dedicated to addressing changed circumstances, should they occur, in Section 6.0, Table 4, of the HCP.

Pursuant to the "No Surprises" Rule (69 *Federal Register* 71723), as codified in 50 CFR, sections 17.22(b)(5) and 17.32(b)(5), the Service will not require the commitment of additional land, water, or other natural resources without the consent of JAT in the event that an unforeseen circumstance occurs, provided that the HCP is being properly implemented. If the Service determines that an unforeseen circumstance has occurred and that additional land, land restrictions, or financial compensation beyond that required under the HCP are needed to conserve the desert tortoise, then JAT will not be obligated to provide the additional measures without their consent. Pursuant to 50 CFR 17.22(b)(8) and 17.32(b)(8), the Service retains the authority to revoke the permit, in response to an unforeseen circumstance or otherwise, if we find that continuation of the take authorized under the permit, would appreciably reduce the likelihood of the survival and recovery of the desert tortoise.

Changes between the draft and the final HCP

1. None.

II. ANALYSIS OF EFFECTS

The Service has determined that the impacts to the desert tortoise that are likely to result from the proposed project will be minimized and mitigated to the maximum extent practicable by measures described in the HCP and the associated permit. The effects of the proposed project on the desert tortoise are fully analyzed in the HCP and the Service's Biological Opinion. A summary of the analysis is provided below.

The desert tortoise, listed as threatened on April 2, 1990, has continued to decline. The closest population survey was completed in Johnson Valley, approximately 20 miles from the unincorporated community of Joshua Tree. The survey data indicated a 79 percent decline in the average density per square mile in that area between 1980 and 1994 (Berry 1996). Habitat destruction, degradation and fragmentation, as well as disease are some of the factors that have negatively affected the desert tortoise throughout its range (Service 1994).

Impacts to the desert tortoise associated with the proposed project include mortality, injury, stress, capture, and removal of habitat. These impacts may occur as a result of desert tortoise clearance surveys, proposed project construction, vehicle collisions, capture and relocation of individual desert tortoises to remove them from dump areas and other dangers associated with cleanup and use of the campground, and other miscellaneous activities. An increase in the predator population in the local area may also occur as a result of this project.

These impacts will be minimized by restricting ground disturbing activities to occur between November and January (if possible) to avoid the period in which desert tortoises are most active. JAT will also use authorized biologist(s) to oversee pre-construction surveys, construction

activities, and installation of temporary and permanent desert tortoise exclusion fencing. The chances of desert tortoises being disturbed, injured or killed are reduced by restrictions on trail and road use, predator management, prevention of litter accumulation, and speed limit enforcement. Desert tortoise-exclusion fencing and signage will be installed around the access road, parking lot, and entrance gate so that no desert tortoises would be injured or killed by vehicles arriving or departing from the parking lot. JAT will require that guests bringing a dog onto the property maintain their pet on a leash or within their desert tortoise-exclusion fenced campsite.

Habitat management and monitoring activities on 300.8 acres may adversely affect the desert tortoise. Specifically, desert tortoises may become stressed and void their bladders if handled improperly when moved out of harm's way. When moving desert tortoises is necessary, the Service-approved biologist or FCR will follow appropriate Service protocol to minimize stress to the animals. Other minimization measures that will be implemented are specified in section 5.0 (page 21) of the HCP.

The conservation strategy of the proposed project will benefit the desert tortoise. In addition to minimization measures, 13.8 acres will be preserved and managed in perpetuity for the benefit of the desert tortoise. This habitat will be contiguous to 287 acres of the property that will remain undeveloped in perpetuity. This mitigation effort will contribute to the long-term recovery efforts of the desert tortoise.

III. PUBLIC COMMENT

The Service has determined that the Joshua Tree Recreational Campground Low-Effect HCP qualifies for a categorical exclusion (CE) under the National Environmental Policy Act (NEPA), as provided by the Department of the Interior Manual (516 DM 2, Appendix 1 and 516 DM 6, Appendix 1). The Low-Effect Screening Form and draft Environmental Action Statement (EAS) were made available for public review through the publication of a Notice of Availability of an HCP and receipt of an application for a Permit published in the Federal Register on July 24, 2006 (71 FR 41835). Publication of the Notice of Availability initiated a 30-day comment period. The notice and supporting documents were available on our website, at a public library in the Community of Joshua Tree, and our Fish and Wildlife Office in Ventura, California.

The Service did not receive any comment letters in response to the Notice of Availability.

IV. INCIDENTAL TAKE PERMIT CRITERIA – ANALYSIS AND FINDINGS

Section 10(a)(2)(A) of the Act specifically mandates that "no permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefore submits to the Secretary a conservation plan that specifies--(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized;

and (iv) such other measures as the Secretary may require as being necessary or appropriate for the purposes of the plan."

Section 10(a)(2)(B) of the Act mandates that the Secretary shall issue a permit if he finds "...after opportunity for public comment, with respect to a permit application and the related conservation plan that---(i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will assure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required under subparagraph (A)(iv) will be met; and he has received such other assurances as he may require that the plan will be implemented..."

With regard to this specific Project, Permit action, and section 10(a)(2)(B) requirements the Service makes the following findings:

1. The taking of the covered species will be incidental.

The take of the desert tortoise within the project area will be incidental to the otherwise lawful construction and use of: 22 campsites, a fitness center, a reception/restaurant building, multiple salt water pools, massage treatment rooms, a horse stable, roads, and trails, as well as management activities (see below) on the remaining 300.8 acres of habitat. JAT is required to obtain a Permit from the State and has complied with all other State and Federal requirements.

2. The permittee will, to the maximum extent practicable, minimize and mitigate the impacts of taking listed species.

Under the provisions of the HCP, JAT will minimize and mitigate all impacts of take, and also monitor through the following measures:

Minimize

- Require that guests bringing a dog onto the property maintain their pet on a leash or within their desert tortoise-exclusion fenced campsite;
- Reduce the size of the Project from 33 Private TP campsites to 22;
- Reduce the number of ancillary structures, such as one photo studio instead of three;
- Limit the grading and removal of native vegetation to the minimum area necessary, not to exceed 100 feet from building footprints;
- Utilize temporary and permanent desert tortoise-exclusion fencing to preclude desert tortoises from entering impact areas;
- Restrict all vehicles, staging areas, etc. to barren areas or within fenced impact areas;
- Prohibit cross-country vehicular travel;
- Utilize Service-authorized biologists to oversee all construction activities where take is likely to occur;
- Establish and administer desert tortoise awareness programs to personnel prior to development;
- Bar firearms and pets on-site during construction;

- Ensure that all litter and refuse will be disposed of properly to avoid attracting desert tortoise predators;
- Restrict (if possible) ground-disturbing activities to between November and January;
- Provide wildlife educational programs and information to guests to protect wildlife and increase conservation awareness;
- Provide all employees with mandatory wildlife awareness training;
- Enforce the speed limit on the main access road to 20 mph and 10 mph within the campground and parking areas;
- Restrict vehicle travel to the main access road and parking lot, excepting emergencies and maintenance; and
- Limit access to campsites and facilities to foot, bicycle, horse, and golf cart only.
- Avoid subsidizing ravens by:
 - Ensuring that pet food is not accessible to ravens by providing guests with raven proof, sealable food and water dishes with instructions to seal dishes when away from the campsite;
 - Ensuring that no new water sources are available through employee awareness training and monitoring;
 - Avoiding new nesting substrates through employee awareness training and monitoring.

Mitigate

- Relocate permanent structures to areas of no or low-density desert tortoise sign;
- Realign the proposed access road to correspond to an existing road;
- Relocate the entrance station out of the wash;
- Realign proposed access trails to tent sites so that they do not coincide with washes;
- Place two culverts under access road at two washes to avoid population fragmentation;
- Locate desert tortoise-exclusion fencing along access road and parking lot to avoid crushing desert tortoises;
- Locate permanent desert tortoise-exclusion fencing along access road close to the edge of the road in the areas that the two culverts transect the road in order to minimize the length of the culverts;
- Locate a desert tortoise-permeable perimeter fence and 24-hour security to eliminate illegal OHV use, dumping, shooting;
- Place 3-strand barbed wire perimeter fence in level areas, attached to rocky areas, rather than entire perimeter;
- Place signs along the perimeter and elsewhere to elevate conservation and wildlife awareness;
- Eradicate entrance roads in rocky areas by vertical mulching or other camouflage method; and
- Conserve and enhance 13.8 acres of desert tortoise habitat, which is adjacent to 287 acres of managed and protected habitat.

Monitor

- Monitor for integrity of perimeter fence, signage and vertical mulching.
- Monitor for integrity of desert tortoise-exclusion fencing.
- Monitor for unauthorized horse and foot trails.

- Monitor for litter.
- Monitor for raven and feral dog occurrences.
- Monitor for unmanaged water sources.
- Monitor for pet compliance.
- Monitor for speed limit compliance.

To make the finding that the conservation measures proposed by JAT minimize and mitigate the taking of the desert tortoise to the maximum extent practicable, the Service must evaluate whether the proposed conservation measures are commensurate with the level of take anticipated. The impacts to the desert tortoise associated with the Joshua Tree Recreational Campground Project are expected to be low because: 1) the amount of habitat being disturbed is small relative to the amount of habitat available within the Joshua Tree area, the West Mojave Recovery Unit, and within the wide range of the species as a whole; 2) most of the areas that will be disturbed during construction and operation of buildings on the site is of poor habitat quality and probably supports few if any desert tortoises due to ongoing, illegal shooting, dumping, and OHV use; 3) disturbance associated with construction of roads on the site is associated with habitat that has already been impacted, to a lesser extent by illegal dumping, shooting, and OHV use; 4) the construction of this park will not serve to fragment desert tortoise populations in the Joshua Tree, California area; and 5) one of the most likely forms of take is capture to move desert tortoises out of harm's way, resulting in temporary, low impacts. The Service believes the conservation measures effectively compensate for the level of take. We find that the HCP minimizes and mitigates the effects of the taking of the desert tortoise to the maximum extent practicable.

Two alternatives to the proposed Project were also considered by the Service. The alternatives are the following: (1) No Action; (2) Alternate Site.

Under the No Action Alternative, the project would not go forward and the Permit would not be issued. In either scenario, failure to implement the project would avoid all potential project-related impacts on the desert tortoise, including the potential for take. However, this alternative was rejected because it did not meet the development goals of JAT, and the desert tortoise would not benefit from the conservation, restoration, and management of 13.8 acres that essentially extends the protection of desert tortoise habitat to an adjacent 287 acres in perpetuity.

The Alternate Site Alternative entailed moving the project to an alternate location within the 314.6-acre property. This alternative involved a more spread-out development with 11 additional campsites and 2 additional buildings in the southeastern region of the property. This location overlapped with the area most used by tortoises. The Service determined that it would likely result in greater impacts to the desert tortoise and its habitat. In addition, JAT can achieve the project goals in the southwestern area of the property where there is less presence of desert tortoises. The Service determined that the proposed project would provide a greater conservation benefit to the desert tortoise than the Alternate Site Alternative.

Therefore, the Service finds that the proposed project minimizes and mitigates the impacts of the taking to the maximum extent practicable because it provides more conservation benefits for the desert tortoise than the other alternatives, while meeting the needs of JAT. The HCP also

represents the most practicable alternative to minimize and mitigate the impacts to the desert tortoise.

3. The permittee will ensure that adequate funding for the HCP and procedures to deal with unforeseen circumstances will be provided.

The costs associated with the HCP are estimated to be \$63,380 in one-time costs and \$1,406 (includes a \$421 contingency that will not be necessarily paid out every year, but will be made available when necessary and replenished) in annual costs for management and monitoring on 13.8 acres for the duration of the Permit. JAT will secure a performance bond in the amount of \$94,000, underwritten by J.R. Olsen Bonds & Insurance Company (California License 0680914), for JAT Associates, for the first 3 years or until financing has been secured, whichever occurs first (See Appendix F of the HCP). With financing in place, JAT will establish the Joshua Tree Campground Foundation (Foundation) to manage the monies set aside to fund all the costs associated with the HCP. The Foundation will be established through the American Endowment Foundation (AEF). The Foundation will receive an initial endowment of \$94,000 (\$93,349.01 rounded up), which will fulfill all the funding requirements for minimization, mitigation and maintenance measures on 13.8 acres. These costs will be fully funded by the completion of Phase 1 of the project. JAT will pay additional voluntary endowments to the Foundation through the revenues generated by the business to fund all of the remaining maintenance costs associated with the wildlife sanctuary. If financing cannot be secured, the bond will be terminated and the project will not be pursued. The Service believes that the performance bond and endowment, and the voluntary endowments, if necessary, will be sufficient to meet the costs associated with the HCP for minimization, mitigation, monitoring, and changed circumstances.

In the event of suspension or revocation, JAT's obligations under the HCP would continue to the extent that the Service determines that take of the desert tortoise occurred under the Permit but was not fully mitigated in accordance with the HCP. In such an event, mitigation measures as identified in the HCP would be implemented until the take has been mitigated to the maximum extent practicable.

Pursuant to the Service's "No Surprises" regulations [50 CFR 17.22(b)(5) and 17.32(b)(5)], the HCP includes procedures to deal with unforeseen circumstances. In the event of unforeseen circumstances affecting the desert tortoise, JAT would not be required to provide the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the HCP without their consent; provided that proper implementation of the HCP has occurred.

Consistent with the "No Surprises" Rule, the HCP also identifies changed circumstances that can reasonably be anticipated and describes the responses to such changes that will be carried out by JAT. JAT has identified and provided a means to address the following changed circumstances: (1) listing of a new species not covered in the HCP; (2) disease outbreak; and (3) wildfire. If the Service lists a species not covered in the HCP during the Permit term, and if the project may result in take of that species, the HCP and the Permit will be reevaluated. The covered activities in the HCP may be modified, as necessary, to ensure that the activities covered under the HCP

are not likely to jeopardize, or result in the take of, the newly listed species, or adversely modify any newly designated critical habitat. If implementing the requirements of this HCP would result in take of the newly listed species, the Service and JAT would modify the HCP and amend the permit, or JAT would apply for a new permit. If a disease outbreak occurs, the authorized biologist would determine the nature of the disease and assess its potential threat to the other desert tortoises. If necessary, the biologist would initiate a program to locate and check resident desert tortoises for signs of the disease. If a wildfire burns on the mitigation land, JAT would assess damage to the affected areas and initiate a program of reseeding and replanting with native vegetation for erosion control and habitat restoration up to 160 acres (as this constitutes the low-lying areas with native vegetation at risk). JAT would work with the Service and the California Department of Fish and Game to determine the most appropriate measures to be implemented for the specific circumstances.

4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Act's legislative history establishes the intent of Congress that this issuance criterion is identical to a finding of "not likely to jeopardize" under section 7(a)(2) (see 50 CFR 402.02). As a result, approval of JAT's permit application has also been reviewed by the Service under section 7 of the Act. The Service concluded in its biological opinion that the approval of JAT's permit application is not likely to jeopardize the continued existence of the desert tortoise. The conclusion was based on the following:

The proposed project will not jeopardize the desert tortoise because it would occur in a small percentage of its range, the proposed action will affect a very limited number of desert tortoises and only 13.8 acres of suitable habitat; additionally, JAT Associated has proposed numerous measures to avoid, minimize, reduce, and mitigate the potential adverse effects of the action on the desert tortoise.

5. Other measures required by the Director of the Service as necessary or appropriate for purposes of the HCP will be met.

The Service will condition the Permit to require: (1) annual reporting; (2) pre-work surveys of, removal of desert tortoises from, and monitoring of all restoration activities during which heavy equipment is use; and (3) the use of qualified individuals approved by the Service to instruct JAT's Field Contact Representative(s) to remove desert tortoises out of harm's way during routine operations on the campground. The Joshua Tree Recreational Campground Low-Effect HCP incorporates all other elements determined by the Service to be necessary for approval of the HCP and issuance of the Permit.

6. The Service has received the necessary assurances that the HCP will be implemented.

JAT's funding assurance of a performance bond and potential for the Service to revoke the Permit will assure that the HCP will be implemented.

V. GENERAL CRITERIA AND DISQUALIFYING FACTORS -ANALYSIS AND FINDINGS

The Service has no evidence that the permit application should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c).

VI. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, I recommend approval of the issuance of permit number TE133476-0 to JAT for the incidental taking of the desert tortoise in accordance with the Joshua Tree Recreational Campground Low-Effect HCP to the extent that their take will be a violation of the Act.

11/8/06
Date

Diane K. Wade
Field Supervisor
Ventura Fish and Wildlife Office

VII. REFERENCES CITED

- Berry, K.H. 1996. A summary of the changes in density of desert tortoise populations at the permanent study plots in California, prepared for Molly Brady, Bureau of Land Management, October 1, 1996 (revised). U.S. Geological Survey. Riverside, California. pp 1-15.
- Circle Mountain Biological Consultants. 2006. Low-effect Habitat Conservation Plan for the Authorized Incidental Take of Desert Tortoise (*Gopherus agassizii*) from the Proposed 314.6 Acre Joshua Tree Recreational Campground Site in the Community of Joshua Tree, San Bernardino County, California. June. Wrightwood, California. Prepared for JAT, Associates, Inc., Los Angeles, California.
- Fish and Wildlife Service. 1994. Desert tortoise (Mojave population) Recovery Plan. U.S. Fish and Wildlife Service, Portland, Oregon. 73 pages plus appendices.
- U.S. Fish and Wildlife Service. 2006a. Environmental Action Statement and Low-Effect Screening Form for the Joshua Tree Recreational Campground Low-Effect Habitat Conservation Plan. Ventura, California. November.
- U.S. Fish and Wildlife Service. 2006b. Intra-Service Biological Opinion on Issuance of an Incidental Take Permit for the Joshua Tree Recreational Campground Low-Effect Habitat Conservation Plan. Ventura, California. October.